STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

IN THE MATTER OF:

The Petition Of The City Of Pekin, A Municipal Corporation, For Approval Pursuant To 735 ILCS 5/7-102 To Condemn A Certain Portion Of The Waterworks System Of Illinois-American Water Company.	)))))	Docket No. 02-0352

REPLY TO BRIEFS ON EXCEPTIONS AND MOTION OF ILLINOIS-AMERICAN WATER COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

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I. INTRODUCTION

This is the Reply to Briefs on Exceptions and Motion ("Reply") of Illinois-American Water Company ("IAWC" or "Illinois-American" or the "Company"). In this Reply, Illinois-American will respond to the Brief on Exceptions of the Staff of the Illinois Commerce Commission ("Staff BOE"), the Brief of Exceptions of the City of Pekin ("BOE" or "Pekin BOE") and the Exceptions of Petitioner City of Pekin ("Pekin Exceptions"). For the reasons discussed herein, the arguments and replacement findings set forth in the Staff BOE, Pekin BOE and Exceptions should be rejected. In addition, Illinois-American will respond to Pekin's Motion for Oral Argument.

In this Reply, we will address first the Exceptions of the City of Pekin ("Pekin" or the "City") and the Staff of the Illinois Commerce Commission ("Staff") that relate to Section III of the Proposed Order issued by the Administrative Law Judge ("Proposed Order"), "Role of the Commission in Condemnation Matters" (pages 3-5), Section V(C), the "Public Interest Analysis" (pages 37-39), and Section VI, Findings and Ordering

Paragraphs (pages 39-41). For Pekin, this discussion covers the Exceptions numbered 3, 4 and 5. We will thereafter address Pekin's Exceptions that relate to Section IV of the Proposed Order (pages 5-37). This discussion covers the Pekin Exceptions designated as 1 and 2.

II. SUMMARY OF POSITION

For reasons that will be discussed, the arguments set forth in the Staff BOE and Pekin BOE are inconsistent with Illinois law and/or contrary to the evidence of record. In many cases, Pekin's BOE either distorts the evidence or disregards it entirely. The replacement findings proposed by Pekin and Staff should be rejected in their entirety.

III. ROLE OF THE COMMISSION IN CONDEMNATION MATTERS (SECTION III)

A. The Staff and the City improperly define the standard of review that the Commission should apply in condemnation matters.

1. The City's position on the standard of review as set forth in its Brief of Exceptions is inconsistent with the standard it previously contended applied in its post-hearing brief and reply brief filed on July 31st and August 28th respectively.

In both its Post-Hearing Brief and its Reply Brief, the City recited the same applicable standard of review as IAWC set forth in its post-hearing briefs and as set forth in the Proposed Order (pages 3-5, 39). In outlining the task presented the Commission in reviewing the evidence, the City stated in its Post-Hearing Brief:

> The Commission's task in this proceeding is to determine whether the City's acquisition of the Pekin District would better serve the public interest than the System's continued private ownership by IAWC. See e.g. County of Lake v. Lake County Water Corp., May 25, 1966 Order, Case No. 51032, p. 3 (ICC 1966); Fernway Sanitary District v. Citizens Utility Company of Illinois, July 10, 1968 Order, Case No. 52024, p. 3 (ICC 1968).

[Pekin Post-Hearing Brief, p. 13.]

Throughout the balance of its Post-Hearing Brief and Reply Brief, the City continued to endorse the same standard and at no point did it ever indicate that a lesser or different standard of review should be followed by the Commission in considering the evidence and ruling on the City's request for permission to condemn the Pekin District. [See e.g. Pekin Post-Hearing Brief pp. 13, 14, 20, 22, 34, 36 and 40; Pekin Reply Brief pp. 2, 45, and 46.] Only after the Proposed Order was filed did the City suggest a lesser standard of review. The City is now criticizing the Proposed Order for not accepting a position that the City itself never took. The City does not even attempt to explain nor justify its sudden change in position. The City's last minute suggestion on this issue is nothing more than a transparent attempt to avoid the Proposed Order's findings that the City failed in its burden of proving that granting it eminent domain authority would better serve the public interest. Even if the City had taken this position prior to the entry of the Proposed Order, it is incorrect and not supported by either Illinois law or prior Commission rulings. If, however, the standard now proposed by the City is utilized, the Petition must still be denied, as discussed below.

2. A "public interest" standard should be applied under Section 7-102 of the EDA.

The City now contends that Section 7-102 of the EDA does not contain a "public interest" or "public convenience" requirement. Pekin BOE, p. 3. In support of this position, the City references the Staff's citation in its post-hearing brief to Department of Conservation v. Chicago & North Western Transportation Co., 59 Ill. App. 3d 89, 91 (1978). In reliance on this case, the City claims that the Commission's role under Section 7-102 is simply to ensure "that property necessary for utility purposes is not taken." Pekin BOE, p. 3. Although the Staff also incorrectly relies on the Department of

Conservation case, it does not follow the City's lead in citing the case for the proposition that there is no "public interest" review requirement under Section 7-102. However like the Staff, the City's reliance on this case is a thinly veiled attempt at misdirection.

The City contends (BOE, pp. 3-4) that Section 7-102 does not contain a "public interest" requirement since the Illinois Court of Appeals in the Department of Conservation case made the comment that the basic function of the Commission approval requirement in condemnation cases "is to ensure that property necessary for utility purposes is not taken." [Pekin BOE, pp. 3-4.] The City fails to explain how that comment in a case involving condemnation of abandoned railroad property could possibly apply to consideration of its Petition, given that all the property that Pekin seeks to condemn is needed and, in fact, now used for "utility purposes." If the comment were indeed controlling in the context of this proceeding, the City's Petition would have to be denied on that basis alone, as all property the City seeks to acquire is necessary for utility purposes. Thus, the comment actually makes no sense in a case, such as this, in which condemnation of an operating utility system is proposed.

The Department of Conservation case dealt with two competing proposals for the sale of an abandoned railroad right-of-way. A group of adjoining landowners wanted to buy the right-of-way for development, and the Department of Conservation wanted to condemn it for a nature trail. Department of Conservation, 59 Ill. App. 3d at 90, 375 N.E.2d at 169 (referencing the more detailed recitation of facts in the previous proceedings reported in Klopf v. Illinois Commerce Comm'n, 54 Ill. App. 3d 491, 369 N.E.2d 906 (1977). What the City fails to grasp is that, in the very case it cites, the Commission approved the Department of Conservation's condemnation petition after

applying the precise "better public interest" standard of review that it now argues should not apply to this matter. Department of Conservation, 59 Ill. App. 3d at 90, 375 N.E.2d at 169 (referencing the previous proceedings in the case reported in Klopf v. Illinois Commerce Comm'n, 54 Ill. App. 3d 491, 369 N.E.2d 906 (1977) (affirming the Commission's finding that "the public interest [would] be better served if it approved the Department's petition" for condemnation)). The City's reliance on the Department of Conservation case provides no support whatsoever to its position that there is not a "public interest" review requirement and it also utterly fails to support Staff's and the City's disagreement with the better public interest standard of review properly set forth in the Proposed Order. To the contrary, the Department of Conservation case is further authority that the better public interest standard is indeed correct.

3. In the public interest analysis under Section 7-102, Illinois law does not recognize a presumption that condemnation by a municipality serves a greater public interest than private ownership.

The City next contends that based on the decision in Illinois Cities Water Co. v. Mt. Vernon, 11 Ill. 2d 547 (1957), there is a legal presumption that public ownership of a water company is in the public interest under Section 7-102 of the EDA. Thus, by simply filing its petition for eminent domain authorization, the City contends it made its prima facie case and the burden to rebut the City's case then fell on Illinois-American. [Pekin BOE, pp. 5-6.] The City's position, however, is contrary to prior orders of the Commission and Illinois law. Also, the "public interest" language that the City pulls from the Mt. Vernon decision is taken out of context. The Mt. Vernon case preceded the amendment to Section 7-102 which required prior Commission approval in order to condemn assets of a regulated public utility. Through the amendment to Section 7-102,

the Illinois General Assembly recognized the there are instances when public ownership may not represent a larger and more general public benefit and the Commission was thus charged with making the better public interest assessment in such cases. Lake County v. Lake County Water Corp., No. 51032 (ICC 1966).

The Mt. Vernon case was a state court condemnation action in which the condemnee, a privately owned water company, in reliance on a long line of eminent domain cases between non-governmental entities, contended that Mt. Vernon did not have the right to condemn because its assets were already devoted to a pubic use and the city intended to place them to the same use. Mt. Vernon, 11 Ill.2d at 553-554. However, none of the cases cited by the water company in Mt. Vernon for that proposition involved a taking by a municipality. In a case of first impression, the Mt. Vernon court held:

> [A] municipality can acquire the property of an existing public utility devoted to the same use as that contemplated by the condemnor, by eminent domain, provided that all requirements of the statutory provisions authorizing the procedure are properly followed. Id. at 556.

As noted above, the legislature then amended the Eminent Domain Act to impose a better public interest level of review by the Commission. Therefore, the public interest language in Mt. Vernon does not have direct application to the public interest analysis that the Commission conducts pursuant to Section 7-102. What Mt. Vernon says is that, if the City had met its burden in the ICC action and established that its condemnation of the Pekin District better served the public interest than continued ownership by Illinois-American, then Illinois-American could not later raise the common law defense of prior public use as an objection to the City's right to take the property in a subsequent state court condemnation action.

4. The Proposed Order correctly followed prior Commission orders and caselaw that have consistently applied a "better public interest" standard.

Although Staff and most recently the City disagree with the standard of review set forth in the Proposed Order, neither the City nor the Staff make an attempt to distinguish the numerous cases and Commission orders which clearly hold that entities petitioning for approval to condemn public utility property must prove that condemnation will better serve the public interest than the other viable alternatives. See Homer Township: Petition For Approval to Acquire the Chickasaw Division of Metro Utilities Co. by Eminent Domain, ICC Docket 92-0258, Order p. 12 (1992) (holding that "in order for a governmental body to receive Commission approval to condemn, it must demonstrate that the condemnation would best serve the public, the public interest and utility users."); Fernway Sanitary District v. Citizens Utility Company of Illinois, ICC Docket 52024, Order pp. 6-7 (1968) (adopting a "better public interest" standard of proof for condemnation petitions); Illinois Power Company, ICC Docket 81-0818, aff'd 111 Ill. 2d 505, 513 (1986) (holding that the commission should approve a proposal only if it is in the better public interest); Klopf, 54 Ill. App. 3d at 498-99, 369 N.E.2d at 911-12 (affirming Commission approval of condemnation petition filed by the Conservation District to condemn land for a nature trail after finding it would better serve the public interest than the proposed sale to adjoining landowners); see also Ambrose v. Thornton Township School Trustees, 274 Ill. App. 3d 676, 680, 654 N.E.2d 545, 548 (Ill. Ct. App. 1995) (the petitioner or party seeking affirmative relief bears both the burden of producing evidence and the burden of persuading the trier of fact).

While orders of the Commission are not generally given res judicata effect, Illinois law clearly recognizes the long-standing principle that the Commission's

interpretation of statutes which it is charged to administer is given significant deference. See Radio Relay Corp. v. Illinois Commerce Commission, 69 Ill.2d 95, 101 (1977) ("Substantial weight is accorded long-standing interpretations of a statute by the administrative body charged with its application."); A. Finkl and Sons Company v. Illinois Commerce Commission, 325 Ill. App. 3d 142, 147-148 (1st Dist. 2001) . ("Generally, this court will not substitute its judgment for a reasonable interpretation of a statute adopted by an agency charged with its administration."). There has not been any legislative or judicial action indicating dissatisfaction with the Commission's consistent interpretation of Section 7-102, which requires a comparative analysis of the better public interest. See Radio Relay Corp., 69 Ill.2d at 101.

As recognized in the Proposed Order, the seminal case on the public interest issue is Fernway Sanitary District v. Citizens Utility Company of Illinois, ICC Docket 52024 (1968). In its order in Fernway, the Commission undertook a detailed examination of the appropriate standard of review it should apply to petitions seeking permission to condemn utility property under Section 7-102 of the EDA, and specifically rejected the interpretations of Section 7-102 that are proposed by the City and by Staff. Staff and the City argue that the Commission should refrain from second-guessing the City's determinations, and should, instead, in a vacuum consider and accept the City's assertions of public interest at face value. In Fernway, the Commission disagreed, finding instead that Commission review was intended to "provide a forum to determine in such cases what action would best serve the public." Fernway, Order p. 7. The Commission specifically stated that its review must not be limited to a "mere formal administrative duty" or rubber-stamp as the City proposes, but should include a detailed

inquiry into whether the proposed condemnation would better serve the public interest than continued ownership by the utility. Id. at p. 6. Clearly, the Fernway decision was a well-reasoned application of the appropriate standard for decision under Section 7-102 of the EDA. Staff characterizes the Commission's position as a "speculative" or "manufactured" assessment of the Section's intent. [Staff BOE, p. 1.] Staff, however, offers no support for its position and no reasoned explanation for its proffered interpretation of the statute.

The Commission rejected arguments similar to those made by the City in Homer Township, ICC Docket 92-0258 (1992). In that proceeding, Homer Township filed a petition under Section 7-102 of the EDA seeking permission to condemn a portion of Metro Utilities Company's water and sewage facilities, citing as its reasons the poor service and the township's desire to control the utility in order to encourage economic development. Homer Township, ICC Docket 92-0258, Order p. 1. The Township argued that the Commission was prohibited from second-guessing the Township's legislative determinations that the condemnation would serve the public interest. Id. at p. 6. The Commission, citing Fernway, rejected the Township's argument, finding that a lower standard would, contrary to the legislative intent of Section 7-102, limit the Commission's review in such proceedings to a "purely ministerial duty" or a "meaningless formality." Id. at pp. 10-11. Instead, the Commission reaffirmed the standard announced in Fernway, placing the burden on the petitioner to demonstrate that the condemnation would better serve the public interest than continued ownership by the utility. Id.